Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1621

MIRA SLOVAK,

Petitioner,

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The following opinions and orders are set out in the Appendix hereto:

Order of the Supreme Court of the United States Extending Time to File Petition for Writ of Certiorari to and including May 9, 1976 entered March 25, 1976. (A. 1)

Order of the United States Court of Appeals for the District of Columbia Circuit (rehearing denied) entered January 9, 1976. (A. 2)

Opinion of the United States Court of Appeals for the District of Columbia Circuit entered October 10, 1975. (A. 3 — A. 4)

Opinion and Order of the National Transportation Safety Board (rehearing denied) entered June 5, 1974. (A. 5 — A. 9)

Opinion of the National Transportation Safety Board entered February 13, 1974. (A. 10 — A. 19)

Opinion of the Administrative Law Judge entered October 4, 1973. (A. 18 — A.30)

JURISDICTION

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 10, 1975 (rehearing denied on January 9, 1976), affirming the judgment of the National Transportation Safety Board entered on February 13, 1974 (rehearing denied with opinion on June 5, 1974), affirming the judgment of an Administrative Law Judge entered on October 4, 1973, suspending petitioner's airline pilot certificate for allegedly violating three Federal Air Regulations while performing a demonstration flight at a local air show held at an uncontrolled and abandoned military airport outside a small desert community in the State of Nevada and where a "*cone of isolated airspace*" surrounding the site of this sporting event had been totally isolated and effectively sealed off by the respondent from all forms of "air commerce" during the event and where no Federal airways

were involved and where the State of Nevada had its own laws in effect to regulate the petitioner's flight and the show.

The Supreme Court of the United States entered an Order on March 25, 1976, Extending the Time to File a Petition for Writ of Certiorari to and including May 9, 1976.

Jurisdiction of the Court is invoked under Section 1486-(f) of Title 49, United States Code, and Section 1254 of Title 28, United States Code.

QUESTIONS PRESENTED

1. Did the respondent have federal authority to preempt the sovereignty and the police power expressly reserved to the State of Nevada under the Tenth Amendment of the United States Constitution when respondent exercised jurisdiction over the petitioner, the police power and the regulations under which a local air show was held at an uncontrolled and abandoned military airport outside a small desert community in the State of Nevada where "air commerce," as defined by 49 U.S.C. Sec. 1301(4), could not possibly have been involved or endangered, especially where respondent formed a "cone of isolated airspace" surrounding the subject airport for a radius of five miles and up to an altitude of 5,000 feet above the ground (10,000 mean Sea Level) which effectively sealed off said airspace from interstate, overseas, foreign, domestic and all other types or forms of air commerce and where no federal airways were involved, and especially where the State of Nevada had claimed sovereignty of the air space above its territory and had its own laws in effect to regulate the petitioner's flight and the conduct of the local air show?

2. Did the Court of Appeals err in its opinion entered October 10, 1975, by ruling that it could not adjudicate the question of jurisdiction over the respondent on the grounds that the question "was never raised" (emphasis added) "at any point in the administrative process" when the opinion of the National Transportation Safety Board entered June 5, 1974, clearly states (emphasis added) (in part) that "Respondent (petitioner here) also argues ... that the Federal Aviation Administration (FAA) has no jurisdiction with respect to respondent's flight", and did the said Court also err in the same opinion by ruling that Section 1486(e) of Title 49, United States Code, "does not permit us to reach the issue" (of jurisdiction)?

3. Can a judgment which deprived the petitioner of a substantial constitutional and property right be upheld where the respondent offered no evidence (emphasis added) at the trial to establish the required prerequisite that the respondent had jurisdiction over the subject matter?

4. Did the respondent unreasonably discriminate against the petitioner and thus deprive him of Due Process under the Fifth Amendment of the Constitution where respondent permitted all members of a class of persons performing in a local air show, and to which the petitioner belonged, to violate Federal Air Regulations 91.79 (a) & (b) without prosecution (by virtue of a "Waiver" issued by respondent and otherwise) when respondent prosecuted petitioner, who performed the same as others, for violating said regulations?

5. Did the Court of Appeals err by affirming the judgment of the National Transportation Safety Board, which held that petitioner had violated FARs 91.79(a) & (b) and one other "consequential" regulation (ie. FAR 91.9) where

(a) the respondent had previously issued a document for the subject air show called a "Waiver" (otherwise known as "Certificate of Waiver or Authorization," FAA Form 7711-1), which Waiver applied to all "participating pilots" in the air show and which expressly waived (emphasis added) and modified said FAR 91.79 (b) and which by the conduct of the respondent impliedly waived FAR 91.79(a) the violation of which caused one additional and "consequential" violation ie., FAR 91.9; and where

(b) the said Waiver was in effect at the time of the alleged violation of FAR 91.79(b); and where

(c) the Waiver and its necessitaty legal effect, or sufficiency were never explained, ruled upon or even offered into evidence by the respondent during the trial, even though reference to the Waiver was made over 47 times during the one-day trial, five times in the opinion of the Administrative Law Judge and two times in the Opinion and Order of the National Transportation Safety Board entered February 13, 1974? (emphasis added)

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the United States Constitution (Bill of Rights) are as follows:

ARTICLE V:

"No person shall be ... deprived of life, liberty, or property, without due process of law ...".

ARTICLE X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article I, Section 8, of the United State Constitution provides in part that Congress shall have the Power:

"(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" and

"(18) To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

FEDERAL STATUTES INVOLVED

The relevant provisions of Title 49 U.S.C. Section 1301 et. seq. are as follows:

SECTION 1301. Definitions.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." emphasis added)

(20) "Interstate air commerce," "overseas air commerce," and "foreign air commerce," respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce . . ."

FEDERAL AIR REGULATIONS INVOLVED

The relevant provisions of the Federal Aviation Regulations, 14 Code of Federal Regulations, are as follows:

"SECTION 91.9. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

SECTION 91.79. Except when necessary for take off or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere, an altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft."

STATEMENT OF CASE

The instant case resulted from a complaint issued against the petitioner by the respondent (sometimes "FAA"), who, as part of its alleged responsibilities, proscribed regulations, policed said regulations and the activities of the petitioner, during his performance of a low level (less than 50 feet) demonstration flight at a local air show held at an uncontrolled and abandoned airport outside a small desert community in the State of Nevada. (Tr. 8) Three Federal Air Regulations ("FAR" 91.9; 91.79(a) & 91.79(b)) were purportedly violated by the petitioner on a day and at a time when the subject airport had been closed by its man-

ager, and at the same time the surrounding airspace had been totally isolated and effectively sealed off to all air traffic (emphasis added) by the respondent, who, prior to the air show, published an official directive in the respondent's official national publication to all pilots, which directive effectively sealed off and formed a **"cone of isolated airspace"** directly over and surrounding the subject airport. (A.31) This directive prohibited all air traffic (emphasis added) (except those in the show) from flying in this cone of isolated airspace within a radius of five miles from the center of the airport or below an altitude of 10,000 feet MSL (above sea level or 5,000 feet above the ground because the airport is 5,000 feet above sea level) during the show. (A. 31)

The subject airport does not and did not have an FAA control tower in operation at any time and is the type of airport commonly referred to as an "uncontrolled field". It was abandoned by the military after World War II, (Tr. 8 & 90) is not used for commercial air travel or for any type of air commerce, and there are no Federal airways in the immediate vicinity. Compared to other airports in the United States, the subject airport can be characterized as a "desert field" with little activity except for a local air show once a year.

Approximately one month prior to the show the respondent issued a document to the Air Show Director, which has been referred to in the prior proceedings as a "Waiver" (FAA Form 7711-1 entitled "Certificate of Waiver or Authorization," dated August 18, 1972), which vital document was referred to four times by respondent's attorney in his opening statement, (Tr. 5) 47 times at the trial, (A. 34) five times in the Opinion of the Administrative Law Judge (ALJ) (A. 18 — A. 30) and two times in the Opinion of the

National Transportation Safety Board (the Board). (A. 10 — A. 17) This document expressly waived and modified FAR 91.79(b) and impliedly waived FAR 91.79(a), (Tr. 238) which are two of the regulations the petitioner was alleged to have violated and upon which his suspension is based, (A. 30) and FAR 91.9 was ruled as a "consequential violation" (A. 7). However, the Waiver, its necessity for the Air Show, its legal effect or its application, if any, to petitioner's flight was never explained or ruled upon, nor was the document ever introduced into evidence, called for, or examined by anyone during any of the proceedings below, including the ALJ and the Board (emphasis added).

Several days prior to the alleged violations, the petitioner was asked spontaneously by the Air Show Director, who had obtained the FAA Waiver, (Tr. 7) to open the show each day by flying his aircraft (as an unscheduled demonstration) "a couple of circles of the **ramp** or course (the race course), land, and we pull him up in front and then parade him with his sponsor in front of the public as a show opener type of thing" and "this would be a good thing for the public . . . show business . . . and they enjoy this" (emphasis added). (Tr. 12 & 13)

Petitioner is alleged to have made his low level demonstration flights on Friday, Saturday and Sunday, September 15, 16 and 17, 1972. The Friday and Saturday flights consisted of "a couple of circles of the course" at the usual race course altitude of approximately 30 feet above the ground. The flights made on Friday and Saturday were "perfect," (Tr. 15) "great show," (Tr. 15) "very well." (Tr. 14 & 16) The ALJ made findings of fact that on Sunday the petitioner, while making one of his "circles of the ramp," flew his aircraft fast at approximately 100 yards horizontal distant from the spectators at a level of 30 or 40

feet and then landed on the far end of a ramp area, all of which the ALJ ruled to be in violation of FAR 91.79(a), 91.79(b) and 91.9. (A. 30)

Another pilot performing in the show, who had been scheduled several months before the show, was authorized to overfly the ramp area and land on the ramp by virtue of the "Waiver." (Tr. 43 & 45) The violation of FAR 91.79-(b) was upheld notwithstanding the fact that petitioner was asked by the Air Show Director (to whom the Waiver was issued) to fly the course or the **ramp** (Tr. 13 & 14) and notwithstanding the fact that FAR 91.79(b) had been waived and modified at the time, and notwithstanding the fact that all other pilots racing or performing in the show did so under the protection of the Waiver and were impliedly immune from FAR 91.7(a). It was undisputed that if the petitioner's impromptu demonstration flight had been included in the Waiver, there would have been no violation. (Tr. 72, 73 & 83).

At no time during the trial did the respondent comply with the required prerequisite of offering any evidence (emphasis added) that it had jurisdiction to exercise authority over the petitioner or the rules or regulations of the subject local air show.

The only specific reference to jurisdiction in any proceeding below was made after the trial by the Board in its Opinion (on appeal by the petitioner) entered on June 5, 1974. Here the Board attempted to confer jurisdiction over the subject matter by citing *U.S. v. Drumm,* 55 F. Supp 151 (1949) (A. 8).

The ALJ ordered that the petitioner's airline pilot certificate be suspended for 60 days. (A. 30) On appeal, the Board reduced the suspension to 30 days. (A. 17) The petitioner then requested a rehearing, (reconsideration) which the Board denied with an Opinion, (A. 5 — A. 9). The petitioner then filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, which Court entered an Order on October 10, 1975, affirming the order of the Board "for reasons set forth in the attached memorandum." (A. 3) Thereafter, petitioner filed a petition in the United States Court of Appeals for the District of Columbia Circuit for a rehearing, which petition was denied by Order of said Court entered on January 9, 1976. (A. 2)

The issue of the jurisdiction of the respondent was first approached during the hearing before the ALJ, (Tr. 234) argued in detail before the Board and expressly (emphasis added) discussed in its opinion (Order No. EA-587, June 5, 1974). (A. 8) However, notwithstanding the foregoing, the Court of Appeals in its Judgment, Order and Opinion entered October 10, 1975, stated that the issue of jurisdiction was raised "for the first time" before said Court and "Because this issue" (jurisdiction) "was never raised at any point in the administrative process," the Court declined to adjudicate the question and also ruled that Section 1486 (e) of Title 49, United States Code, "does not permit us to reach the issue." (A. 4)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The United States Court of Appeals for the District of Columbia Circuit has erroneously declined to decide an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States.

The question as to whether or not the Federal Aviation Administration has Federal authority to preempt the sovereignty and police power expressly reserved to the States under the Tenth Amendment of the United States Constitution when it exercises jurisdiction over the police power, regulations and participants at local air shows held in the various States, and in this case the State of Nevada is an important question of Federal Law which has not been, but should be, settled by the Supreme Court of the United States. It is estimated by the respondent that there are over 1,500 such local air shows in the United States each year which are sponsored by local communities and at which time aircraft are displayed, demonstrated, and occasionally perform acrobatics and occasionally will race and all of which are supervised and policed by the FAA. These local shows are most always held at small uncontrolled community airports, away from major airports and Federal airways, and are always limited to low level flying activities. The State of Nevada, like most of the other States, has ample laws and regulations similar to those of the Federal Government to control and regulate these shows. *Nevada Revised Statutes (Uniform State Law For Aeronautics)* (A. 32)

Furthermore, the State of Nevada has claimed the sovereignty of the airspace above its territory except where granted to the United States by the people of the state and recognize that where Federal airways and air commerce are concerned, the Federal Government has certain preemptive rights. *N.R.S.* Sec. 493.030 (A. 32)

The power of Congress to regulate commerce is derived from the United States Constitution, Article I, Section 8. (Pg. 6)

The power of the FAA to regulate air commerce is granted by statute (Federal Aviation Act of 1958 as amended, Title 49, Chapter 20, U.S. Code). The respondent derives its power to regulate air commerce from the Congress, *C.A.B. v. Delta Airlines, Inc.* (1961) 81 S. Ct. 1611, 367 U.S. 316, 6.L.Ed. 2d, 869, at 881. In *Braniff v. Nebraska,* 74 S. Ct. 757 at 761 (1954), the Supreme Court held that:

> "These Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable airspace as distinguished from sovereignty."

Heretofore, the federal jurisdiction over states' rights has been strictly limited to situations where local activities pose a burden or unreasonable interference or obstruction of the free flow of interstate commerce, e.g., labor strikes — *N.L.R.B. v. Jones & Laughlin Steel,* 57 S. Ct. 615 (1937); wheat growing — *Wichard v. Filburn,* 63 S. Ct. 82 1942); and interstate commerce — *Lockheed Air Terminal, Inc. v. City of Burbank,* 98 S. Ct. 1854 (1973).

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *United States Constitution, Tenth Amendment.*

The definition of "air commerce" as set forth in Section 1301 (4) and (20) of Title 49, United States Code, (Pg. 6) makes it extremely difficult to understand how a local sporting event and the petitioner's flight conducted under a "cone of isolated airspace" could possibly be "any operation or navigation of aircraft which directly affects or which may endanger safety in interstate, overseas or foreign air commerce" so as to confer jurisdiction on the respondent. Furthermore, a careful examination of the transcript fails

to disclose any evidence (emphasis added) or that any evidence was offered to show that the respondent had jurisdiction over the petitioner's flight.

If the respondent found it necessary to monitor such a sporting event and felt that the petitioner had violated the law of the State of Nevada in conducting his demonstration flight, then the matter should have been turned over to the appropriate State official rather than to assume control, thereby usurping the police power of the State.

In the instant case, and prior to the subject air show, the respondent, by virtue of its own act, formed a "cone of isolated airspace" surrounding the subject airport for a radius of five miles and up to an altitude of 5,000 feet through which no non-performing aircraft were allowed to pass during the show. Airman's Information Manual, Part 3A (A. 31) By so isolating the airspace and insulating it from all forms of air commerce, the respondent by its own act effectively precluded itself from jurisdiction and effectively reserved said airspace to the State of Nevada. Furthermore, in the instant case there were no Federal airways within miles of the subject airport. **Nowhere does it appear in the record that the presence of the Federal Government at this or any other local air show is needed or necessary, or that (as in this case) the State of Nevada is not capable of managing its own affairs.**

While the role of the Federal Government in regulating "air commerce" is not contested by the petitioner, the role of the FAA in this instance appears to be as questionable as the role of the Interstate Commerce Commission if it took jurisdiction over the Indianapolis "500" automobile races.

The jurisdiction over local air shows under these circumstances should rest with the States, and in this case, with

the State of Nevada. The case against the petitioner should have been dismissed.

II. The United States Court of Appeals for the District of Columbia Circuit has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States and in conflict with the decision of another Court of Appeals on the same matter, as a result of which the petitioner has been denied a substantial constitutional right.

The Court of Appeals in its Memorandum of Opinion entered on October 10, 1975, declined to adjudicate the question of jurisdiction of the respondent on the grounds that the question "was never raised" (emphasis added) "at any point in the administrative process..." (A.4). This obvious error is apparent from the face of the record (emphasis added) upon examination of a portion of the Opinion of the Board which clearly states that "respondent" (petitioner here) "also argued . . . that the Federal Aviation Administration (FAA) had no jurisdiction with respect to respondent's flight..." (A. 8). It has long been the law of the Supreme Court that the question of jurisdiction "can always be raised — it never comes too late," *Danning v. The United States,* 259 F. 2d 305 at Pg. 309 (1958), 79 S. Ct. 587 (Cert. denied 2/24/59).

On review of an administrative order, the Court of Appeals should, where the issue is raised, resolve the question of jurisdiction before considering the petition on the merits. *Cardillo v. Liberty Mutual Insurance Company,* 67 S. Ct. 801 at Pg. 804 (1947).

In *Cardillo supra,* at Pages 804 and 805 (1947), the Supreme Court held that "... where the issue (jurisdiction) is raised . . . a federal court first" (should) "satisfy itself

that the administrative agency . . . had jurisdiction over the matter in dispute."

In addition and on this point, the Court of Appeals in its Opinion ruled that Section 1486(e) of Title 49, United States Code, "does not permit us to reach the issue" (jurisdiction). (A. 4) An examination of the Section (e) discloses that the Court of Appeals is not limited thereby (emphasis added to reach the issue of jurisdiction.

Section 1486(e) of Title 49, United States Code, provides:

"The finding of facts (emphasis added) by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so."

It would appear from the foregoing that the Court of Appeals erred twice on the question of jurisdiction contrary to applicable decisions of the Supreme Court of the United States and another Court of Appeals on the same matter—once by failing to adjudicate the question of jurisdiction, and secondly by erroneously ruling that Section 1486(e), *supra,* does not allow it to reach the issue of jurisdiction.

The petitioner is an airline captain who earns his livelihood in that capacity. He is presently under a 30-day suspension which, if upheld, will deprive him of his livelihood during that period and urges that the failure of the Court of Appeals in this regard has deprived him of a substantial constitution and property right as granted to him under the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Board in its Opinion entered on June 5, 1974, attempted to confer jurisdiction upon itself by relying on *U.S. v. Drumm, supra.* The petitioner urges that the decision of the Board on jurisdiction is not final, *Las Vegas v. CAB* 298 F 2d 430 at 433 (1962) and that this reference by the Board on (appeal) in the absence of any evidence offered below, falls short of the required prerequisite of showing the interstate character of petitioner's alleged offense necessary to support the findings against him. *United States v. Apex Distributing Company, Inc.,* 148 F. Supp 365 at 372 (1957). The quantum of evidence necessary to establish jurisdiction of the Federal Aviation Administration must be substantial (emphasis added). *Utah Copper v. Railroad Retirement Board,* 129 F. 2nd 358, Cert. denied 63 S. Ct. 258. The respondent offered no such evidence in the case at Bar (emphasis added).

Furthermore, in the *Drumm* case, *supra,* the issue was whether the Civil Aeronautics Board exceeded its authority by requiring an airman to obtain a pilot's certificate and an aircraft to possess an airworthiness certificate. Jurisdiction was sustained because the operations of uncertified (emphasis added) airmen anywhere in the "navigable airspace overlying the United States constitutes a hazard to interstate, overseas and foreign air commerce." Such an issue is not relevant here.

Since no evidence of jurisdiction has ever been offered, the Court of Appeals should have ruled that the case against the petitioner should have been dismissed.

III. The respondent unreasonably discriminated against the petitioner and thus deprived him of Due Process under the Fifth Amendment to the United States Constitution.

Under this heading, the petitioner includes questions number 4 and number 5 of his petition. The petitioner was found to have violated FAR 91.79(b) and two other FARs resulting from the violation of said 91.79(b). Prior to the commencement of the subject air show, the FAA issued a document entitled a "Waiver," otherwise known as "Certificate of Waiver or Authorization," FAA Form 7711-1, which Waiver applied to all "participating pilots" in the air show and which expressly waived (emphasis added) and modified said FAR 91.79(b) and several other FARs (Tr. 5). The Waiver was in effect during the time of the alleged violations so as to permit various activities of the air show to take place.

Without conceding the primary question (or any other issue raised herein) as to whether or not the FAA had jurisdiction as previously discussed herein, this vital document (the Waiver) was mentioned over 47 times during the one-day trial, five times in the Opinion of the ALJ and two times in the Opinion of the Board entered February 13, 1974, yet this document and its necessity, sufficiency, its legal effect were never explained, (emphasis added) ruled upon or even offered into evidence by the respondent during the trial. There was no adjudication at the trial as to whether or not the Waiver applied to the petitioner, or if the Waiver was in proper form to adequately protect "participating pilots." (emphasis added) That the petitioner participated in the air show cannot be denied. He was asked by the Air Show Director, to whom the Waiver was issued by the respondent, to fly the course or the ramp area (emphasis added) (Tr. 13 and 14) and to open the show each day (Tr. 7), and this he did.

It is inconceivable that under these circumstances the petitioner was not flying under the protection of the

Waiver, yet the Court of Appeals also declined to decide or rule upon the absence of, the lack of explanation, the sufficiency or the applicability of this document to the petitioner's flight. If the Court of Appeals, the Board or the Trial Court had properly ruled upon the legal effects of the Waiver and ruled that the petitioner came under the protection of the Waiver, and that the Waiver was insufficient to allow petitioner's flight, then it could be argued that the petitioner did not in fact violate any Federal Air Regulations. The Air Race Director testified that if the petitioner's flight was included in the Waiver there would have been no problem (Tr. 72 & 73) (emphasis added).

It is on this point that the petitioner argues that his rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States were violated in that he was discriminated against "with an unequal hand" and as a member of a class, namely "participating pilots" to whom the respondent had issued a Waiver because (i) when the petitioner flew in the show, as he was asked to do, he was not granted the protection of the Waiver, as given to *all* the other pilots, particularly one Robert Hoover, who was authorized by the Waiver to do what the petitioner had done, namely to fly over the ramp as requested by the air race director (emphasis added) and to land thereon: and (ii) because the petitioner was violated on FAR 91.79(a) which was impliedly waived to all other pilots performing in the show who while either racing (30 feet above the ground) or while performing aerobatics (sometimes only a few feet above the ground) were of necessity operating their aircraft below an altitude (emphasis added) where if their "power unit fails, an emergency landing (could be made) without undue hazard to persons or property on the surface," FAR 91.79(a). The petitioner

urges that the respondent is estopped to deny the implied waiver of FAR 91.79(a). (Tr. 33, 105, 106 & 112) *Yick Wo v. Hopkins,* 6 S. Ct. 1054 (1886). The case against the petitioner should be dismissed.

CONCLUSION

Where air shows in the United States are increasing in number each year, the issue as to whether or not the Federal Government has jurisdiction over local sporting events, as outlined above, is one which should now be settled by the Supreme Court of the United States.

It is therefore respectfully requested that this Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,
S. MYRON KLARFELD

Attorney for the Petitioner

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-829

MIRA SLOVAK,

Petitioner

V.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9, 1976.

/S/ WARREN E. BURGER

Chief Justice of the United States.

Dated this 25th day of March, 1976

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1751 September Term, 1975

MIRA SLOVAK, *Petitioner*

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *Respondent*

FILED
JAN. 9, 1976
ROBERT A. BONNER
CLERK
UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

Before: Leventhal and Wilkey, Circuit Judges; Merhige*, United States District Court Judge for the Eastern District of Virginia.

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam

For the Court:

ROBERT A. BONNER
Clerk

* Sitting by designation pursuant to Title 28 U.S. Code Section 292(d).

Not to be published — See Local Rule 8(b).

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1751 September Term, 1975

MIRA SLOVAK, *Petitioner*

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *Respondent*

FILED
OCT. 10, 1975
HUGH E. KLINE
CLERK
UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL AVIATION ADMINISTRATION

Before: LEVENTHAL and WILKEY, Circuit Judges and MERHIGE*, United States District Court Judge for the Eastern District of Virginia

JUDGMENT

This cause came on for consideration on a petition for review of an order of the Federal Aviation Administration and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Federal Aviation Administration is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam

For the Court

HUGH E. KLINE
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 292(d)

No. 74-1751 — Slovak v. Butterfield, Administrator

MEMORANDUM

Petitioner seeks review of Order No. EA-587 of the National Transportation Safety Board (the Board) suspending his airline transportation pilot certificate for 30 days. The suspension is based upon a finding that petitioner violated Sections 91.9, 91.79(a), and 91.79(b) of the Federal Aviation Regulations during an exhibition flight at the Reno (Nev.) National Air Races on 17 September 1972.

After a thorough examination of the transcript of the agency hearing we conclude that there was substantial evidentiary support upon which to base a finding that the three regulations were violated. We also noted no conduct by the Administrative Law Judge (ALJ) or the administrative prosecutor which would have had the effect of denying petitioner a fair and impartial proceeding. Both the ALJ and the Board in their opinions conscientiously examined the evidence and gave due consideration to the arguments presented by petitioner.

Petitioner raises for the first time before this court the argument that the above-cited regulations cannot apply to a pilot flying a demonstration flight at an air show because such a flight is not "in air commerce" within the meaning of 49 U.S.C. §1301(4). Because this issue was never raised at any point in the administrative process, the judicial review statute under which we are permitted to review Board action does not permit us to reach the issue. 49 U.S.C. §1486(e).

Affirmed.

(emphasis added)

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

ADOPTED BY THE NATIONAL TRANSPORTATION SAFETY BOARD
AT ITS OFFICE IN WASHINGTON, D.C.
ON THE 5TH DAY OF JUNE 1974

ALEXANDER P. BUTTERFIELD
ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,
Complainant,

vs.

MIRA SLOVAK,
Respondent,

SERVED: June 13, 1974
NTSB Order No. EA-587

Docket SE-2080

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent has filed a petition for reconsideration of NTSB Order EA-557, February 13, 1974, whereby the Board ordered respondent's airline transport pilot certificate suspended for 30 days because of violations of sections 91.79(a) and (b) and 91.9 of the Federal Aviation Regulations which stemmed from an unauthorized low pass over, and subsequent landing on, a ramp area during a demonstration flight conducted in connection with air races held at

Reno, Nevada, on September 17, 1972. The Administrator has submitted a reply opposing the petition.[1]

Respondent attacks certain findings of the law judge and/or the Board as being erroneous, unsupported by the evidence, or irrelevant. After carefully examining the record, we have found these charges to be unfounded. Specifically, the record indicates that on Sunday, the day of the incident in question, respondent requested, but was denied, permission to take off on the ramp and thereafter took off on the runway. (Tr. 92).[2] The Board cannot agree that this information is irrelevant since it might demonstrate respondent was aware of the necessity of obtaining clearance prior to using the ramp area, an awareness which has some bearing on his subsequent landing on the ramp without first obtaining such clearance. The record also supports the finding that the ramp was being used to move aircraft into position for an upcoming race. The operations officer testified that at the time of respondent's landing, aircraft were being wheeled or hand-pushed outside the pit area over the ramp to a point where they would be in position for a race-horse start (Tr. 96). Such evidence bears, of course, on the hazard posed by respondent's unauthorized landing on the ramp area.

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[1]Respondent has also moved to dismiss the Administrator's complaint on the grounds that the Administrator, by referring in his reply to purported violations committed by the respondent, has presented a prejudicial matter to the Board. These alleged prior violations were not in any way considered by the Board in reaching the decision embodied in Order EA-557, nor have they been considered in weighing respondent's petition herein. Although we agree that reference to these matters by the Administrator at this stage of the proceeding is inappropriate and irrelevant, such reference is not, in our view, grounds for dismissal of the complaint.

[2]The inconsistency within the law judge's decision on the point of whether the request was made by respondent or someone on his behalf is inconsequential.

To clear up any misconception on respondent's part, the Board did not affirm the law judge's finding that respondent's operation of the aircraft was "reckless."[3] Rather, the Board chose to characterize said operation as "careless" (EA-557, p. 8, f.n. 11). The fact that respondent's low pass and landing on the ramp were deliberate rather than inadvertent does not preclude a finding of careless operation since carelessness can take the form of a disregard of safe operating practices and applicable safety regulations. Moreover, we adhere to our view that the low pass and landing created a hazard which constituted the second required element (endangerment) of a section 91.9 violation.[4]

We cannot agree with respondent that takeoff or landings on the ramp by other pilots excused a similar action by respondent. As we pointed out in our decision, these other planes had been specifically cleared for such maneuvers and therefore proper precautions, such as clearing the ramp, were taken. Significantly, prior clearance had not been granted, and the necessary precautions had not been taken, prior to respondent's landing. Nor can we accept as exculpatory the fact that respondent's engine was prone to overheating while taxiing, which purportedly would justify a landing on the ramp to avoid the longer taxi distance between the runway and the stands where the aircraft was eventually parked. Such a factor cannot reasonably be considered the type of emergency which would justify deviating from the saftety regulations. Aversion of a minor

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[3]The Board adopted the law judge's findings, "except as modified" in the Board's Opinion (EA-557, p. 3).

[4]The Board has consistently held that the endangerment may be potential as opposed to actual. We would hasten to add, again as we have stressed in prior Board decisions, that a section 91.9 violation is basically consequential to the other regulatory violations and therefore has little bearing on sanction.

potential hazard by actions which produce a greater hazard are not justifiable.[5]

Respondent also argues, in effect, that the Federal Aviation Administration (FAA) has no jurisdiction with respect to respondent's flight since it did not directly affect or endanger safety in interstate air commerce.[6] The intrastate nature of the respondent's flight, however, does mean that the safety regulations promulgated and enforced by the FAA are not applicable. It is well settled that the FAA's authority has been broadly construed to extend to such flights because of their saftey impact on interstate air commerce.[7] (emphasis added)

Finally, with respect to sanction, the Board has reexamined the entire record in light of respondent's petition and again has concluded that a 30-day suspension is appropriate to the circumstances of the case.[8]

In conclusion, respondent has presented no matter or argument which would warrant modification or reversal of the Board's decision or justify the relief requested.[9]

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[5]The proper and safer course of action would have been either (a) to obtain clearance to land on the ramp, which could then be cleared, or (b) to land on the runway and taxi to a point where the engine temperature became excessive, and then shut it down.

[6]The FAA is empowered to regulate safety in "air commerce" which is defined in section 101(4) of the Federal Aviation Act as "interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

[7]See, e.g., *U.S. v. Drumm*, 55 F. Supp. 151 (1949).

[8]We find none of the cases cited by respondent regarding sanction to be apposite to the unique circumstances of the instant case.

[9]Respondent also seeks, as an alternative, a rehearing. However, he has not, as required by the Board's rules, presented new matter, a substantiation thereof, or an explanation of why such new matter could not have been presented previously. Adequate grounds for a second hearing are therefore totally lacking.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion to dismiss the complaint be and it hereby is denied; and

2. Respondent's petition for reconsideration be and it hereby is denied.

REED, Chairman, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above order. HALEY, Member, was absent, not voting.

(SEAL)

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

ADOPTED BY THE NATIONAL TRANSPORTATION SAFETY BOARD
AT ITS OFFICE IN WASHINGTON, D.C.
ON THE 13TH DAY OF FEBRUARY 1974.

ALEXANDER P. BUTTERFIELD,
ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,

Complainant,

vs.

MIRA SLOVAK,

Respondent,

SERVED: June 13, 1974
NTSB Order No. EA-587

Docket SE-2080

OPINION AND ORDER

Respondent has appealed from the initial decision of Adminstrative Law Judge Fred L. Woodlock, issued on October 4, 1973.[1] The law judge found that respondent, on September 17, 1972, was pilot-in-command of Aircobra P-39-Q, (an experimental aircraft) on a demonstration flight before a crowd of approximately 15,000 people attending the Reno National Air Races at Reno-Stead Airport, Reno, Nevada; that the closest boundary of the race course was

[1]A copy of the initial decision is attached.

1,000 feet from the spectator stands; that respondent operated said aircraft over an asphalt ramp area[2] at an altitude of less than 100 feet, at a lateral distance of approximately 300 feet from the stands and at a speed of approximately 300 knots; and that respondent thereafter made an unauthorized landing on the ramp area at a time when the ramp was being used to pre-position other aircraft for the upcoming race. The law judge further found that, by reason of the aforesaid conduct, respondent violated the following Federal Aviation Regulations:

> Section 91.9,[3] in that he operated an aircraft in a reckless manner so as to endanger the lives or property of another,
>
> Section 91.79(a),[4] in that he operated an aircraft below an altitude allowing an emergency landing to be made without undue hazard to person or property; and

[2]This ramp area was 600 feet wide and was located between the stands and the airport runway which marked the boundary of the racecourse.

[3]Section 91.9 provides that "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[4]Section 91.79(a) and (b) provides as follows

"91.79 *Minimum safe altitudes; general.*

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft."

> Section 91.79(b), in that he operated an aircraft over an open air assembly of persons at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet.

The law judge thereupon affirmed the Administrator's order suspending respondent's airline transport pilot certificate for a period of 60 days

In support of his appeal, respondent has filed an appeal brief in which he argues that a number of the law judge's findings are not supported by the evidence, that the law judge erred in excluding certain evidence offered by respondent and in admitting other evidence offered by the Administrator over the objection of respondent, and that the bias and hostility of the law judge prevented respondent from having a fair and impartial hearing.[5]

The Administrator has submitted a reply brief in which he argues that the initial decision should be affirmed, since it is supported by a preponderance of the evidence adduced at a fair and impartial hearing.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified to reduce the suspension period to 30 days. Except as modified herein, we adopt as our own the findings of the law judge.

With respect to respondent's charge of erroneous evidentiary rulings and partially on the part of the law judge,

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[5]Respondent has also requested oral argument before the Board. It is apparent from the record, however, that this case has been exhaustively tried by both parties and that nothing would be gained by further argument. Consequently, respondent's request is denied.

the Board has carefully examined the transcript of the hearing and found nothing therein which warrants either modification of the initial decision or remand for a new hearing before a different law judge. The Board notes, for example, that a sizable number of the law judge's rulings were adverse to the Administrator, which belies the claim that the law judge presided in a consistently one-sided manner. Although the hearing was marked by sharp verbal exchanges, some of which involved the law judge, none of these, in our judgment, indicated a bias on his part nor did they constitute an abuse of the broad discretion afforded a law judge presiding at an adversary hearing.

The exclusionary rulings specifically disputed by respondent pertain to three areas: (1) the flight of another pilot Bob Hoover, who also landed his aircraft on the ramp; (2) the danger of respondent's low pass and landing, including a comparison of said danger to that engendered by other flights such as Bob Hoover's; and (3) the reputation and character of respondent as a safe and careful pilot. The record shows that a considerable amount of evidence was admitted concerning Bob Hoover's flight, as summarized in the initial decision (I.D., 6). As the law judge noted, however, Bob Hoover's flight is distinguishable from respondent's in the significant respect that the former flight was authorized and thereby preceded by a "sterilization" or clearing of the ramp area, whereas the latter was not. Therefore, the two flights are not directly comparable from the standpoint of danger. In any event, the degree of danger created by respondent's flight is a legal question to be decided by the law judge within the context of section 91.9. The resolution of such an issue is more properly based on all the factual circumstances surrounding the incident, rather than on various witnesses' opinions regarding the

element of danger Finally, we note from the record that it is questionable whether the law judge in fact excluded testimony pertaining to respondent's character.[6] At any rate, we fail to discern the relevance of such testimony, since again the ultimate issue of whether a violation occurred must rest on the facts surrounding the incident, rather than on the pilot's reputation or record.

Turning to the merits of the case, respondent first contends that the very general authorization given to him by the executive director of the air race was in effect a kind of carte blanche "to do just about anything that he wanted to do.'"[7] It is apparent from the record, however, that the generality of the authorization pertained to the type of demonstration flight to be conducted, rather than to the proximity of the flight and landing to the ramp area and spectators. Flying over and landing on the ramp area was contrary to both the applicable regulations and to the waiver from such regulations granted to the air race. Other aircraft taking off from or landing on the ramp area had been specifically authorized to do so, and proper precautions were taken prior to such maneuvers. Respondent, on the other hand, had no such specific authorization, and therefore no steps were taken to clear the ramp before his low pass or landing. Under the above circumstances, we cannot accept the hypothesis that the general authorization regarding the demonstration flight gave respondent a blanket immunity from regulations designed to assure safe separation between operating aircraft and assembled crowds of people.

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[6]From a close reading of the record (see Tr. 59-63), it appears that respondent assumed that the law judge would exclude such testimony if offered, which led respondent not to call character witnesses. However, there was never a direct ruling to that effect.

[7]Respondent's appeal brief, p. 8.

Respondent next disputes the law judge's finding that respondent operated his aircraft at a lateral distance from the spectator stands of 300 feet, arguing that 400 feet would be a more accurate figure for this distance. We are inclined to agree with respondent on this point;[8] however, the additional 100 feet is of little consequence since respondent was still well within both the 1,000-foot limit provided by the air race waiver and the vertical and horizontal limits established by section 91.79(b).

Respondent also contends that the law judge's finding with respect to the landing on the ramp area should be made more specific to reflect that the landing was at the extreme north and west of the ramp area. The executive director of the air race, the operations officer, and a contestant (witnesses called by the Administrator) all testified that the landing occurred in the middle of the ramp area remaining outside of the pit area--i.e., about 200 feet inside the extreme north end of the ramp area.[9] Respondent and four witnesses called by him testified that the landing was made at the extreme north end of the ramp area. The law judge appears to have given the greatest credit to the testimony of the operations officer, which is reasonable since that witness was in the best position to observe respondent's flight.[10] In any event, and as the law judge pointed out "the landing was accomplished within the proscribed distance to persons and structures, whichever point of touchdown is accepted" (I.D., 8).

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[8]See Tr. 22 and Tr. 131.

[9]The total ramp area extended 600 feet out from the edge of the spectator stands. The pit area constituted approximately the first 200 feet of this area, leaving 400 feet of ramp area remaining.

[10]The operations officer was on a scaffold approximately 20 feet high, from which he had a clear view of the ramp.

Respondent also attacks the eighth finding of the law judge that "at the time of said landing, the ramp area was in use for prepositioning of race aircraft for a start in the next event" (I.D. 12). This finding, as indeed all of the findings, must be read in the context of the entire initial decision. Thus, we note that the law judge stated on page 9 of his decision that, at the time of landing, respondent's aircraft was within 200 feet of aircraft being moved into position, a statement which accurately reflects the record. Furthermore, the initial decision also reflects that no witness testified that he actually saw any person or vehicle closer to respondent's landing aircraft than as stated above.

Finally, respondent contests the ultimate findings of the law judge regarding the violations of sections 91.79(a) and 91.9. As noted hereinabove, these findings are basically legal in nature, and must rest on the law judge's evaluation of all the facts of record, rather than individual witnesses' opinions of the degree of danger or lack of safety attending a given flight or incident. In our judgment, the finding of a violation of section 91.79(a) is amply supported by the record, considering in combination the altitude and speed of aircraft during the low pass and its proximity to the pit and spectator areas. It is our further view that a violation of section 91.9 was clearly established, in view of respondent's lack of care in making the low pass and landing and the hazards created thereby.[11]

The remaining matter concerns sanction. Air race operations, including demonstration flights such as respondent's, have an exceedingly narrow margin of safety which can be overstepped easily if the regulations and rules governing such operations are not adhered to strictly. It was respondent's failure in the above regard which led to the violations established herein, which violations in turn must be characterized as serious in nature. Generally speaking, the 60-day suspension imposed by the Administrator and affirmed by the law judge would be reasonable and appropriate. In this instance, however, consideration must be given to the mitigating circumstance that respondent earns his livelihood as an air carrier pilot and thus would incur a severe financial penalty as a result of being grounded by a suspension. On balance, it is our conclusion that a suspension period of 30 days would serve as a sufficient disciplinary and deterrent sanction.

[11]However, we believe it is more representative of the entire record to characterize respondent's operation of the aircraft as "careless" rather than "reckless," the term used by the law judge.

1. Respondent's request for oral argument be and it hereby is denied;

2. Respondent's appeal be and it hereby is granted in part and denied in part;

3. The Administrator's order, and the initial decision, be and they hereby are affirmed, except as modified with respect to sanction; and

4. Respondent's airline transport pilot certificate be and it hereby is suspended for a period of 30 days, to commence 30 days after service of this order.

REED, Chairman, McADAMS, THAYER, and HALEY, Members of the Board, concurred in the above opinion and order. BURGESS, Member, was absent, not voting.

(SEAL)

SERVED: October 4, 1973

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION

vs.

MIRA SLOVAK

DOCKET SE-2080

SERVICE:

Mira Slovak, Respondent, Jib 14, Apartment 14,
Marina Del Rey, California 90291;

Richard T. Sykes, Esquire, Attorney for Respondent,
15720 Ventura Blvd., Encino, California 91316;

David L. Mahan, Esquire, Attorney for the Administrator,
Federal Aviation Administration, P.O. Box 92007,
Worldway Postal Center, Los Angeles, California 90009.

INITIAL DECISION OF JUDGE FRED L. WOODLOCK

Respondent Mira Slovak having appealed from the order of suspension issued to him by the Regional Counsel of the Federal Aviation Administration on December 21, 1972, pursuant to the provisions of Part 421, Title 14, The Code

of Federal Regulations, a hearing was held in Los Angeles, California, on May 2, 1973. The respondent was present and represented by Richard T. Sykes, Esquire; the complainant was represented by David L. Mahan, Esquire, of the Office of Regional Counsel for the Western Region of the Federal Aviation Administration. The order of suspension serves as the complaint herein.

The respondent is the holder of airline transport pilot certificate 1281522 and was pilot-in-command of a civil aircraft, certificated in the experimental category, on a flight on September 17, 1972, in the vicinity of Reno/Stead Airport, Reno, Nevada.

It is alleged that at the time of this flight a crowd of approximately 15,000 people was in attendance at the Reno National Air Races and seated in stands approximately 2,500 feet in length 1,000 feet from the east/west runway and parallel and adjacent to an asphalt ramp 4,500 feet by 600 feet located between the stands and the runway; that the part of the race course located closest to the spectators' stands was defined as the south edge of the east/west runway, approximately 1,000 feet north of the stands; that during the course of the flight respondent operated his aircraft directly over and along the asphalt ramp area at an altitude of less than 100 feet and at a distance from the stands of approximately 300 feet, at a speed of approximately 300 knots; that following the low flight he landed his aircraft without authorization on the asphalt ramp area near the pits located immediately west of the spectator stands, terminating such landing on the ramp area in front of the stands; that at the time of this landing the ramp area was in use and aircraft were being moved into position for the next race event; and that thereby he violated Sections 91.9, 91.79(a), and 91.79(b) of the Federal Avia-

tion Regulations. It was determined by the Federal Aviation Administration that a 60-day suspension of the respondent's airman certificate would be appropriate under the circumstances set out in the complaint.

The respondent, while admitting that he was pilot-in-command of the aircraft on the flight described, that the aircraft was certificated in the experimental category, and that such flight was authorized, denies the other allegations of the complaint. However, respondent's counsel in his opening statement conceded that respondent was probably at the edge of the ramp when he made the low pass in front of the grandstand but asserted that since he was not flying the race course he was not confined to the "deadline" of the course. Since he had been asked by the executive director of the Reno National Air Races to put on a show and had been advised to use his own judgment on the kind of show, what he did was a reflection of that judgment and therefore he cannot be criticized for the judgment he displayed. Finding that the ramp was perfectly clear and deciding that since he had not been told that he could not land on the ramp, he did so in order to reduce taxiing and avoid overheating his engine. Such overheating would have been costly in its possible damage to the engine; furthermore, he did not want to hold up the air show by having to shut down his engine on the runway and having the aircraft pulled onto the ramp.

Jerome Duty, executive director of the Reno National Air Races, testified that immediately prior to the races on Friday morning,[1] the first day of the three-day event, he had discussed with respondent the possibility of his putting on

[1]Whether respondent actually flew on Friday is a matter of dispute. A resolution of the question is not, however, material to the issues herein.

some sort of show for the spectators while they awaited the start of the races Although at first reluctant respondent was finally persuaded to do so because of the favorable publicity which would accrue to the owner of the aircraft, the name of the owner being imprinted in large letters on the side of the aircraft. Accordingly, on the first day the respondent made a normal flight with which no fault was found. A performance on the next day of the races, that is on Saturday morning, was similarly uneventful. The flight on Sunday, however, was the one which gave rise to the enforcement action now before us. During this flight the witness observed respondent as he flew over the ramp at an altitude of 10 to 25 feet at a speed in excess of 300 knots. At this time he was within 300 to 400 feet of the spectators, of whom there were over 20,000 in the stands. Subsequently, this witness observed the aircraft on the ramp during its landing roll-out with the nose gear not in contact with the surface when it was halfway down the length of the ramp. Duty had given no authorization to the respondent to make the pass over the ramp nor to land on the ramp. The witness, at the time of the landing, had already told the pit operations people to start moving their aircraft out on the line to get them ready to participate in the races, and he did not know whether there were people on the ramp at the time. A conversation he had with the respondent immediately after the landing brought forth the comment from the respondent that since another pilot had been permitted to break the deadline he felt he was entitled to do so.

Another pilot, Bob Hoover, did land a Shrike aircraft on the ramp. This had been specifically authorized under the terms of the waiver granted to the Air Races by the Federal Aviation Administration. That landing, however, was executed on the overrun to the ramp and not on the ramp itself.

Furthermore, Duty testified, prior to Hoover's landing the ramp had been "sterilized" and motorcycle policemen had assured the absence of spectators and aircraft. Some race aircraft were permitted under the terms of the waiver to take off from the ramp area; however, none of the unlimited class were allowed to do so. If respondent had taken part in the races his aircraft would have fallen in the unlimited category.

Wayne Adams, operations officer at the Reno National Air Races on this occasion, with responsibility for coordinating pre-show activities with Duty and ensuring that the races were kept on schedule, was positioned on the south edge at the approximate center of the ramp on a scaffolding approximately 20 feet high, from which point he had observed the respondent's aircraft during its earlier flights on Friday and Saturday. He recalled that on Sunday either the respondent or someone on his behalf had called and requested permission to take off on the ramp. Permission to do so was refused and the respondent made his takeoff on runway 7. Adams saw respondent fly south of the deadline on his third pass. His opinion was that the respondent at that time was over the ramp area. He saw the aircraft land at a point approximately a third of the way down from the west end in the pit area. This point is indicated by a red circle on Administrator's Exhibit No. 2.) At the time of the landing Adams saw other aircraft being wheeled into position for a race start, an activity which normally took from 20 to 30 minutes. At the point where respondent landed, the ramp was approximately 400 feet wide and the respondent's aircraft was some 200 feet from other aircraft parked in the pit. It was Adam's responsibility to assure that the ramp was clear when operations were conducted on it, and he had not directed any clearing in prep-

aration for the respondent's landing. He was particularly concerned by the landing because there was a small rise on the ramp which obstructed the view from the west end and he feared that there might be some vehicular traffic or people in the area not visible to a pilot in a landing aircraft. He had observed people on the ramp north of the pit area a few minutes prior to the respondent's touchdown, although he did not see anyone at the time of touchdown.

Robert Downey, a spectator at the races in 1972 and a participant in prior years, testified that he observed the respondent's aircraft passing from west to east at a low altitude, and that he also observed the landing. He estimated that the respondent was some 200 feet from the spectators at the time he made his pass and about the same distance away when he came rolling up the ramp during the latter portion of his landing.

The respondent contends that the flight on Sunday morning, which included the low pass and the ramp landing, was conducted pursuant to the general instruction of Mr. Duty that he was to use his own judgment. Furthermore, because of a race scheduled at 10:30 and which commenced before 11:00 a.m., the police were regularly policing and clearing the ramp. The only traffic on the ramp at the time the respondent was flying would have been official cars. He did not believe he was confined to the "deadline" of the race course and there was nothing he was restricted from doing. He landed on the ramp to reduce the amount of taxiing he would be required to do and avoid damage to the engine.

Respondent testified to the extensive experience he has acquired flying in air races and air shows, over a period of five years in Czechoslovakia and 15 years in the United States. He denied that he had made any flight on Friday morning and stated he had appeared that day on a televi-

sion program which commenced at 12:30 p.m. in downtown Reno. He recalled that on Friday afternoon when he first talked with Duty, he was told to use his own judgment as to the kind of show he put on. He had seen another pilot (Ike Hoover) make a simulated landing on the ramp during the 1972 races. According to the respondent he (respondent) touched down on the extreme west end and close to the north edge of the ramp. He described his low-level pass as having been made right on the north edge of the mat over the grass. He admitted that he knew the limits of the race course. He had attended the Friday, Saturday, and Sunday pilot briefings.

Herman Salmon, a former test pilot for Lockheed and a participant in several air races, testified that on the day here in question he was located at the west end of the ramp in the pit area. (The point is indicated on Administrator's Exhibit No. 3 by a red "X.") He testified that the ramp area was kept very clear all that day and that he observed the respondent make his landing on the ramp. He fixed the touchdown as being on the north portion of the ramp area next to the grass strip. He located the respondent's touchdown point on Administrator's Exhibit No. 3 by a red "X" circled in red. Salmon's description of the pass made by the respondent prior to landing agreed generally with that given by other witnesses The landing path of the respondent's aircraft was approximately 150 to 180 feet away from him.

Michael Curella, who also observed the landing, described it as on the far (west) edge of the ramp area and close to the north edge of the ramp.

Richard Dawes, an aircraft broker by vocation and a crew chief at the races by avocation, testified that he saw the low

pass and landing executed by the respondent. His opinion was that the respondent was well clear of the ramp area and probably over the grass on the pass and that the landing was 200 to 500 feet west of the west end of the ramp,

Two pictures introduced by the respondent's counsel (Respondent's Exhibits C and D), who described what they purported to represent, cannot be considered to have any probative value since no witness identified them. However, to dispose of any question about these particular pictures, which according to counsel, represented aircraft rolling on the ground on one wheel, I can say that I am unable to determine from examining them how high the two aircraft were or whether or not they were rolling on one wheel.

The only area of dispute here lies in the actual point at which the respondent touched down on landing, although there is no doubt that it was on the ramp. No great discrepancy appears in the testimony concerning the low pass. Although the respondent's witnesses described the aircraft when making that pass as a little farther out over the grassy area than did the complainant's witnesses, whether it was operating over the grass just north of the ramp area itself, the operation was clearly violative of Section 91.79 of the Federal Aviation Regulations. It is also apparent that the landing was accomplished within the proscribed distance to persons and structures, whichever account of the point of touchdown is accepted.

The witness in the best position to observe the respondent's flight and landing was Wayne Adams. His testimony reflects that the respondent had requested permission to take off from the ramp and being denied permission to do so took off on runway 7. There was no request for permission to land on the ramp. The suggestion that radio prob-

lems might have interfered with such a request is given no weight by this finder of facts. Adams described the touchdown as being approximately one-third of the length of the ramp east of its west end. At that time there were aircraft being pushed into position for the start of the race at the west end. The landing, he estimated, was accomplished at a distance of not more than 200 feet from the aircraft being moved into position. He had observed people on the ramp in the area of the landing within a couple of minutes before, although he did not recall having seen anybody there at the time of, the touchdown. Those authorized to be on the ramp included pit crews, motorcycle police, and vehicles used to direct the aircraft. To complicate the situation a small rise or hump directly in front of the operations tower made it difficult for a person in an aircraft on the ground to see whether there were people or vehicles on the other side of the hump.

The respondent appears to rest his defense on three grounds: first, that he was given unlimited discretion by Duty as to the maneuvers he might perform, and that, therefore, his exercise of that discretion was immune from any action by the Federal Aviation Administration; secondly, that the waiver did not apply to him, but covered only those people in the races; and thirdly, that since another pilot had been granted permission to land and take off in front of the ramp area then he, with all his expertise and experience in aviation was entitled to do so. None of these arguments are convincing. No twist of logic can justify the position that the respondent, by implied permission of another party who had no authority to grant such permission was free to fly closer to the crowd than the waiver allowed; if, as respondent argues, the terms of the waiver were not applicable to his operation then it fol-

lows that the regulations as they stand were applicable and he must bear full responsibility for deliberately ignoring them; the fact that another pilot had been authorized to perform maneuvers on the ramp area or that other aircraft were permitted to take off from the ramp is no justification for respondent's decision to do so. The main concern of the personnel at the air races, both in operations and ground control, was to keep the ramp clear when scheduled events were taking place. That concern was clearly aroused by respondent's operations. For him to ignore basic rules of safety and land in reliance on his own determination that the area was clear amounts to a reckless operation which certainly cannot be condoned. It is noted that Section 91.79 permits aircraft to fly within distances less than minimal when necessary for landing or takeoff. However, the landing on this occasion was not necessary nor is there any indication that it was considered necessary. The respondent's own determination that the possibility of engine failure due to the overheating of the engine while taxiing is not a convincing reason for the risks involved on this occasion. Possible financial expense cannot be considered sufficient grounds for what was clearly a hazardous operation.

Accepting for the sake of argument counsel's representation that the respondent was "one of the best aviators in the world for the operation of fighter or jet or any other kind of airplanes" (for which opinion there is no evidence in the record), the possession of such expertise does not entitle the respondent to ignore the clear wording of the regulations and standard safety practices. Such an argument, if respondent is of the same opinion, reflects adversely on his attitude towards safety and towards compliance with the regulations. To this writer it would appear

that the most important attribute of a pilot is his attitude towards safety. This attitude is reflected in his willingness to comply with the regulations. No amount of technical proficiency can compensate for a lack of judgment or an unwillingness to comply. Nor is the opinion of others as to that pilot's attitude sufficient to overcome the clear evidence of that attitude reflected in his actual operations. Those operations were deliberately undertaken.

The allegations set out stand established and support the charge of violations of the cited regulations. The sanction proposed is considered appropriate, taking into consideration the experience and occupation of respondent as well as the grave danger to lives of persons on the ground in the area of respondent's activities.

FINDINGS

Based upon the evidence of record herein, the undersigned makes the following findings:

1. Respondent is now, and at all times mentioned herein was, the holder of Airline Transport Pilot Certificate No. 1281522.

2. On or about 17 September 1972 respondent was pilot-in-command of civil aircraft N-40A, an Aircobra P-39-Q, certificated in the experimental category in August 1972, on a flight in the vicinity of Reno-Stead Airport, Reno, Nevada.

3. At the time of the flight in issue a crowd of approximately 15,000 people in spectator stands was in attendance at the Reno National Air Races. The spectator stands, of bleacher construction, were approximately 2,500 feet in length, situated parallel to the airport's east/west runway and adjacent to an asphalt ramp (4500′ x 600′) located between the stands and the runway.

4. Prior to one of the day's races respondent was authorized to make a flight around the race course to demonstrate his aircraft to the crowd of spectators.

5. The boundary of the race course located closest to the spectator stands, defined as the south edge of the east/west runway, was approximately 1,000 feet from the stands.

6. During the course of the flight described in paragraphs 2 and 4 above, respondent operated aircraft N-40A directly over and along the 4500′ x 600′ asphalt ramp area at an altitude of less than 100 feet and at a lateral distance from spectator stands of approximately 300 feet at a speed of approximately 300 knots.

7. Following the low pass described above respondent landed said aircraft on the asphalt ramp area near the pit area, located immediately west of the spectator stands, said landing terminating on the ramp area in front of the spectator stands. This landing on the ramp area was unauthorized.

8. At the time of said landing the ramp area was in use for pre-positioning of race aircraft for a start in the next event.

9. Considering the altitude and speed of the pass over the ramp area and the distance from the spectator stands an emergency landing could not have been made without undue hazard to persons or property on the surface.

By reason of the foregoing circumstances, it is found that respondent violated the following Federal Aviation Regulations:

a. Section 91.9 in that he operated an aircraft in a reckless manner so as to endanger the lives and property of another.

b. Section 91.79(a) in that he operated an aircraft below an altitude allowing an emergency landing to be made without undue hazard to persons or property on the surface.

c. Section 91.79(b) in that he operated an aircraft over an open air assembly of persons at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet.

By reason of the actions hereinbefore described, respondent failed to exercise the degree of care, judgment, and responsibility required of the holder of an Airline Transport Pilot Certificate.

ORDER

Now, therefore, IT IS ORDERED, that respondent's airman certificate 1281522, and any other pilot certificate held by respondent, be and the same is hereby suspended, effective on the 11th day after the date of this order, such suspension to continue for a period of sixty (60) days after such certificate shall have been surrendered to the Regional Counsel of the Federal Aviation Administration (P. O. Box 92007, Worldway Postal Center, Los Angeles, California 90009).

FRED L. WOODLOCK

Administrative Law Judge

APPEAL

Either party may appeal this initial decision by filing with the National Transportation Safety Board, Docket Section, 800 Independence Avenue S. W., Washington, D. C. 20591, and serving upon the other parties a notice of appeal within ten (10) days after the date hereof and by filing a brief setting forth in detail the objections to this initial decision within twenty (20) days from this date. The timely filing of such an appeal shall stay the order in this decision.

If no appeal by either party is filed or the Board on its own motion does not review this decision, this initial decision shall become final.

AIRMAN'S INFORMATION MANUAL

The relevant provisions of the Airman's Information Manual, Notices to Airmen, Part 3A, Department of Transportation, Federal Aviation Administration, for the period August 31, 1972, to September 14, 1972, are as follows:

"SPECIAL AIR TRAFFIC PROCEDURES

Reno, Nevada—15, 16, 17 September 1972—Page 3A 5

The Federal Aviation Administration has established the following special airport traffic control procedures during the National Championship Air Races on 15, 16 and 17 September 1972.

RENO/STEAD Airport closed.

The Air Race Director has closed Reno/Stead Airport to non-race aircraft continuously from 0600 PDT, 10 September, through 1800 PDT, 17 September. Pilots should avoid the area within a five-mile radius from Reno/Stead Airport and up to 10,000 feet MSL" (5,000 feet above the ground)

"during this period. Check NOTAMS for additional restrictions during demonstrations."

The relevant provisions of the Nevada Revised Statutes (Uniform State Law for Aeronautics) are as follows:

"493.030 Sovereignty in space. Sovereignty in the space above the lands and waters of this state is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the state. [2:66:1923; NCL Sec. 276]

493.050 Lawfulness of flight. Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land and water, is put by the owner, or unless so conducted as to be eminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in NRS 493.060. [4:66;1923; NCL Sec. 278]

493.100 Dangerous flying a misdemeanor. Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this state, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall, except while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor. [9:66:1923; NCL Sec. 283] — (NRS A 1967, 596)

493.130 Operation of aircraft while under influence of intoxicating liquor, controlled substance or in reckless

manner a gross misdemeanor; exception. Any person operating an aircraft in the air, or on the ground or water, while under the influence of intoxicating liquor or a controlled substance as defined in chapter 453 of NRS, unless in accordance with a prescription issued to such person by a physician, podiatrist or dentist, or operating an aircraft in the air or on the ground or water, in a careless or reckless manner so as to endanger the life or property of another shall be guilty of a gross misdemeanor. [1:114:1947; 1943 NCL Sec. 288.1] — (NRS A 1967, 597; 1971, 2031; 1973; 8)

492.140 Standards for determining careless or reckless aircraft operation. In any proceeding charging careless or reckless operation of aircraft in violation of NRS 493.130 to 493.200, inclusive, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing areonautics. [2:114; 1947; 1943 NCL Sec. 288.2]

493.150 United States certificate, permit required for operation of civil aircraft within state. It shall be unlawful for any person to operate or cause or authorize to be operated any civil aircraft within this state unless such aircraft has an appropriate effective certificate, permit or license issued by the United States, if such certificate, permit or license is required by the United States. [3:114; 1947; 1943 NCL Sec. 288.3]

494.160 Uniformity of interpretation and construction of chapter. This chapter shall be so interpreted and construed as to make uniform so far as possible the laws and regulations of this state and other states and of the government of the United States having to do with the subject of airports. [15:246: 1949; 1943 NCL Sec. 293.15]"

REFERENCES TO THE WAIVERS IN THE TRANSCRIPT

The references to the Waiver in the transcript and Opinions are as follows:

Opinion of the Administrative Law Judge

A. 21, A. 22, A.26 (2 times) and A.27.

Opinion of the National Transportation Safety Board

A. 14 and A. 15. February 13, 1974.

The Trial

Tr. pages 5 (4 times), 7 (2 times), 20, 27 (4 times), 29, 30 (3 times), 33 (5 times), 35 (3 times), 36, 37, 47, 72 (2 times), 73, 80, 81, 83 (3 times), 84 (4 times), 233 (2 times), 236 (5 times), 237 and 238.

Supreme Court, U. S.
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No. 75-1621

In the Supreme Court of the United States

OCTOBER TERM, 1975

MIRA SLOVAK, PETITIONER

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1621

MIRA SLOVAK, PETITIONER

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ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. The National Transportation Safety Board suspended petitioner's airline transport pilot certificate for 30 days (Pet. App. A.17). It found that petitioner had violated Sections 91.9, 91.79(a) and 91.79(b) of the Federal Aviation Regulations[1] by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another, by operating an aircraft below an altitude allowing an emergency landing to be made without undue hazard to persons or property on the surface, and by operating an aircraft over an open air assembly of persons at an altitude of less than 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet.

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[1] 14 C.F.R. 91.9, 91.79(a) and (b).

Petitioner was to have been a participant in the Reno National Air Races on September 15-17, 1972, but arrived too late to qualify. Because petitioner had been the winner of the first Reno air races, he was asked to fly several laps around the race course prior to the start of the races (Pet. App. A.20-A.21). While there was a waiver of certain federal air regulations in effect for the participants of the races themselves, this waiver was not applicable to petitioner's unscheduled exhibition (Pet. App. A.14).

Petitioner flew exhibitions on September 15 and 16 without incident. On September 17, however, without authorization (Pet. App. A.14, A.21), petitioner flew over a ramp, on which there were several aircraft and 2,500 to 5,000 persons, at an altitude of 10 to 25 feet and a speed in excess of 300 miles per hour (Pet. App. A.21). This maneuver also brought petitioner's aircraft within 400 feet of spectator stands in which there were 20,000 persons (*id.* at A.15, A.21, A.23). Petitioner then landed the aircraft on the ramp within 200 feet of other aircraft (*id.* at A.16, A.22, A.24). The closest boundary of the race course, by contrast, was 1,000 feet from the spectator stands (*id.* at A.10-A.11).

On December 21, 1972, petitioner was notified by the Federal Aviation Administration that his airline transport pilot certificate was to be suspended for 60 days. Petitioner appealed his suspension to the National Transportation Safety Board (Pet. App. A.18-A.19). After a full evidentiary hearing, an administrative law judge of the Board upheld the suspension (*id.* at A.18-A.30). Petitioner appealed this decision to the full Board, which affirmed but reduced the suspension to 30 days (*id.* at A.10-A.17). It wrote (*id.* at A.16-A.17):

> Air race operations, including demonstration flights such as [petitioner's], have an exceedingly narrow margin of safety which can be overstepped easily if the regulations and rules governing such operations are not adhered to strictly. It was [petitioner's] failure in the above regard which led to the violations established herein, which violations in turn must be characterized as serious in nature.

Petitioner sought review in the court of appeals, which ruled that the Board's decision was supported by substantial evidence (Pet. App. A.3-A.4).

2. Petitioner's primary contention is that the federal air regulations were not applicable to petitioner's flight because that flight was purely intrastate.[2] This argument is insubstantial. Section 1108(a) of the Federal Aviation Act of 1958, 72 Stat. 731, 798, 49 U.S.C. 1508(a), provides that "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States * * *."

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

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[2]It is true, as petitioner points out, that the court of appeals' memorandum erroneously asserts that this jurisdictional issue had not been properly preserved. Compare Pet. App. A.4 with *id.* at A.8. But petitioner drew this discrepancy to the attention of the court of appeals in a petition for rehearing. The court denied the petition (*id.* at A.2), thereby rejecting the jurisdictional argument.

Northwest Airlines, Inc. v. *Minnesota,* 322 U.S. 292, 303 (Jackson, J., concurring). See also *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633-634.

It is undisputed that this incident took place in the "airspace of the United States." In the exercise of its authority over that air space, Congress required the Federal Aviation Administration to promulgate regulations "for the protection of persons and property on the ground" (Section 307(c), 49 U.S.C. 1348(c)). The regulations violated by petitioner were promulgated pursuant to this statutory directive.

Petitioner contends, however, that there was no nexus between his offending flight and interstate commerce. Even if that is so, the flight gave grounds for believing that petitioner is a careless pilot, and the Administrator has the authority to protect the public from careless pilots by suspending petitioner's license, which allows him to engage in *inter*state flight. Moreover, as this Court has held, where Congress has created a pervasive regulatory scheme, it has the power to regulate purely intrastate activities that are ancillary to that scheme. *United States* v. *Midwest Video Corp.,* 406 U.S. 649; *United States* v. *Southwestern Cable Co.,* 392 U.S. 157. Cf. *Perez* v. *United States,* 402 U.S. 146.

3. Petitioner makes a number of other arguments. These arguments all depend on the particular facts of this case and afford no occasion to grant the petition.[3] What is more, none of them was presented to the court of appeals, and no exceptional circumstances justify this Court's entertaining them now. *United States* v. *Ortiz,* 422 U.S. 891, 898; *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 147 n. 2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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[3]Petitioner's argument (Pet. 4, 17-20) that he was "discriminated" against was answered by the Board, which pointed out (a) that participants in the races could approach no closer than 1,000 feet to the spectators, whereas petitioner flew a plane within 25 feet of many people; and (b) that one other pilot who landed on the ramp had given notice and obtained permission, while petitioner had done neither (Pet. App. A.13). Petitioner's arguments (Pet. 4-5, 18-19) concerning the waiver of the regulations for the races, and the fact that it is not in the record, grow out of problems largely of his own making. Petitioner never sought to have the waiver introduced into evidence. His argument was not that the waiver was discriminatory or that it had authorized his maneuvers, but that the director of the races had given him an oral "carte blanche." The Board found that defense wanting both factually and legally (Pet. App. A.14). Petitioner cannot now complain that insufficient attention was paid to the written "waiver."

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ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

ROBERT H. BORK,
Solicitor General,
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Washington, D. C. 20530.

In the Supreme Court of the United States

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ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

In our memorandum in opposition to the petition for a writ of certiorari in this case, we stated that "the Board * * * pointed out (a) that participants in the races could approach no closer than 1,000 feet to the spectators, whereas petitioner flew a plane within 25 feet of many people * * *" (Mem. in Opp. 5, n. 3). Petitioner correctly observes (Pet. Reply 3-4; Pet. Motion to Strike) that the reference to "within 25 feet" was inaccurate.

With regard to the proximity of petitioner's flight path to spectators and others in the immediate area, the Board in fact summarized the evidence as follows: (1) the flight was performed before a crowd of approximately 15,000 people (Pet. App. A10); (2) petitioner flew an aircraft at an altitude of less than 100 feet (*id.* at All) at a lateral distance of approximately 400 feet from the spectator stands (*id.* at A15); (3) at the time of landing, petitioner's aircraft was within 200 feet of other aircraft being moved into position (*id.* at A16); and (4) "no witness testified that

he actually saw any person or vehicle closer to [petitioner's] landing aircraft than [that]" (*ibid.*).*

Accordingly, we withdraw any suggestion that the Board found that petitioner flew his aircraft within 25 feet of any individual or that he in fact did so.

The factual inaccuracy contained in our memorandum in opposition did not, however, constitute "scandalous matter" within the meaning of Rule 40(5) of the Rules of this Court. Petitioner's motion to strike the memorandum on that ground should therefore be denied. The petition for a writ of certiorari also should be denied for the reasons stated in the memorandum.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

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*The administrative law judge recited that one witness had observed petitioner fly the aircraft at an altitude of 10 to 25 feet above a ramp that was situated in front of the viewing stands (Pet. App. A19, A21). The ramp contained a pit area (Tr. 23), in which 2,500 to 3,000 (Tr. 40) or from 3,000 to 5,000 (Tr. 24) people were located. However, the ramp was 600 feet wide (Tr. 23), the pit area occupied only the 160 feet nearest the stands (*ibid.*), and petitioner's aircraft passed over the outer section of the ramp away from the pit area (Tr. 42).

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OF THE

United States

OCTOBER TERM, 1975

No. 75-1621

MIRA SLOVAK,

Petitioner,

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Reply of Petitioner to Memorandum for the Respondent in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1975

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ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Without waiving his Motion to Strike the Memorandum for the Respondent in Opposition, the Petitioner replies to said memorandum as follows:

1. The primary questions before the Court deal with jurisdiction i.e.: (a) whether the respondent has jurisdiction over local air shows conducted outside the scope of "air commerce" as defined by 49 U.S.C. Sec. 1301(4) and where the State of Nevada has laid sovereign claim to the airspace over its territory (Pet. App. A. 32); (b) whether the Court of Appeals erred in not adjudicating the question which was properly raised (as conceded by the respondent (Mem. 3, footnote 2)); and (c) whether the judgment against the petitioner can stand where the respondent offered no evidence of jurisdiction at the trial.

The question in paragraph 1(a) has never been and ought to be decided by the Court. The argument of respondent that the Federal Aviation Act of 1958, 72 Stat. 731, 798, 49 U.S.C. 1508(a) grants to the government "exclusive national sovereignty in the airspace of the United States . . ." cannot possibly mean that the Federal Government controls all the airspace in the country from the ground up. Petitioner, as an airline captain, concedes that in certain locations (such as the approach areas of runways on major airports and in certain restricted or test areas) that the Federal Government ought to have control from the ground up to a reasonable height. However in the instant case the questionable activity took place at low level (10-25 feet, and perhaps a little higher at other times), at a remote location with no nexus to the jurisdiction of the respondent and where the harboring state had its own sovereignty, laws and police to perform the very same activity as respondent.

Why then is the added arm and expense of respondent required for such a purely local event? The cases cited by the respondent (Northwest Airlines v. Minnesota 322 U.S. 292 and Burbank v. Lockheed, 411 U.S. 624) are easily distinguishable as they deal with "air commerce".

2. The respondent *acknowledges* "that the court of appeals' memorandum erroneously asserts that this jurisdictional issue had not been properly preserved." However, the respondent disposes of the obligation of the court to deal with the question of jurisdiction (once raised) as described in paragraph 1(b) above, by simply stating that the issue was raised in a petition for rehearing and since the Court of Appeals denied the petition, the jurisdictional argument was rejected. (Id. page 3). This is contrary to the law in Cardillo v. Liberty Mutual Ins. Co., 67 S. Ct. 801 at page 804 (1947). Once raised the question of jurisdiction should be resolved as it should have been here.

3. The respondent makes no comment on the issue in paragraph 1(c) above which questions the validity of the judgment against petitioner where no evidence of jurisdiction was offered at the trial.

4. The respondent has, clearly and unjustly made several misstatements of fact in its Memorandum in Opposition which the petitioner is compelled to point out to the Court.

(a) The factual question of *where* the petitioner flew his aircraft *is not contested*. Notwithstanding however, the respondent in its footnote 3 on page 5 of its memorandum has stated that "the Board, . . . pointed out (a) that participants in the *races* could approach no closer than 1,000 feet to the spectators, *whereas petitioner flew a plane within 25 feet of many people*;" . . . (emphasis added).

No such finding was ever made by the Board nor does it appear anywhere in the record!! In another document which is being filed by petitioner concurrently herewith, it will be shown why this misstatement was made by respondent.

(b) In paragraph 2 on page 2 of its Memorandum, the respondent states that the "petitioner flew over a ramp, on which there were several aircraft and 2,500 to 5,000 persons, at an altitude of 10 to 25 feet and a speed in excess of 300 miles per hour (Pet. App. A. 21)."

The statement as phrased does not appear on said page 21 or elsewhere! The statement as phrased would have the Court believe that the petitioner actually flew over the heads or near many people from 10 to 25 feet (as also incorrectly stated in footnote 3 supra) and such was not the case! The closest *estimate* was between 200 and 300 feet. (Tr. 121)

Mr. Duty, the respondent's first witness against the petitioner testified that there was a *pit area* (where the planes were parked as distinguished from the entire ramp which

was 4,500 feet long and 600 feet wide) located on the near side of the ramp near the grandstands. (Tr. 23); that the "*police* estimated" the crowd in the *pit area* to be from 3,000 to 5,000 people (Tr. 24) but that he (Duty) put the figure at from "2,500 to 3,000" (Tr. 40); and that the petitioner *"was not over any person"* and that "he wasn't over *anything* except that *outer section* of the ramp." (Tr. 42). Mr. Adams, the respondent's second witness placed petitioner's flight about 200 feet in from the outer edge of the ramp (Tr. 97) and that the *pit area* was roped off "pretty well" (Tr. 100). This roping was to keep the crowds off the ramp area. In another document which is being filed by the petitioner concurrently herewith, it will be shown why the respondent created this offending phrasing.

5. The petitioner steadfastly maintains that he is being unfairly punished for doing what Mr. Duty, the air race director *and the person to whom the* FAA Waiver was issued, asked him to do i.e.:

> "I asked him (petitioner) if he would take his plane off and fly a couple of circles of the **RAMP** (emphasis added) or course, land, we pull him up in front and then parade him with his sponsor in front of the public as a show opener type of thing, and I felt this would be a good thing for the public." (Tr. 13). ". . . Mr. Duty says the airport is yours." (Tr. 207 by Curella). Despite this uncontradicted evidence the Administrative Law Judge erroneously found that, "Duty had given *no* authorization to the respondent (Slovak) to make the pass over the ramp . . ." (Id. A. 21, lines 19, 20).

Surely Mr. Duty had the color of authority when he made this request. The ramp area and the race course were both less than 2,000 feet from the spectators, and of necessity the flight would have to be below 1,000 feet, both facts well known to Mr. Duty. Without some immunity, the flights, if

carried out, would most certainly be a violation. (Tr. 72 and 73)

The petitioner flew the course on Friday and on Saturday **— both times without objection from the respondent and to the pleasure of the air race director —** "perfect", (Tr. 15) "great show", (Tr. 15) "very well". (Tr. 14 and 16)

Yet when he flew over a portion of the Ramp on Sunday, as he was asked, he was violated on FARs 91.79(a) and (b).

At each level of the proceedings the transcript was "carefully examined" by the Board (Pet. App. A. 13), the record was carefully reexamined again on rehearing (Id. A. 6) and the Court of Appeals made "a thorough examination of the transcript of the agency hearing" . . . (Id. A. 4) but *somehow* the facts that Mr. Duty, who held the Waiver asked a "reluctant" petitioner (also an airline captain) to put on a show — a *"good thing for the public"*, (Tr. 12 and 13) (emphasis added) which he did and as a result he is now faced with having his right to earn a living suspended for 30 days, are circumstances the unfairness of which have not yet attracted the attention of the courts. The petitioner urges in addition to the primary jurisdictional issues, that these are exceptional circumstances worthy of the Supreme Court's consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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